Supreme Court, U.S.
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No. 01-239

In The

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and UNITED STEELWORKERS OF AMERICA, LOCAL 14398,

Petitioners,

v.

APPALACHIAN REGIONAL HEALTHCARE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Should a petition for a writ of certiorari be denied when the decision of the Court of Appeals below, following well-established law upon which there is no circuit split, merely affirmed the vacatur of a labor arbitration award because the arbitrator ignored the plain language of the governing collective bargaining agreement and instead imported the arbitrator's own notions of industrial justice, thereby failing to draw the essence of the arbitration award from the collective bargaining agreement?

CORPORATE DISCLOSURE STATEMENT

Appalachian Regional Healthcare, Inc. has no parent corporation, nor do any publicly-held companies own ten percent or more of the stock of Appalachian Regional Healthcare, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. THE GRIEVANTS WERE DISCHARGED AFTER THEY REPEATEDLY REFUSED DIRECT ORDERS TO CONTINUE WORKING PAST THE END OF THEIR REGULAR SHIFT 1

B. THE RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT 3

C. THE ARBITRATION AWARD IGNORED EXPLICIT CONTRACT PROVISIONS AND IMPOSED LIMITATIONS UPON THE HOSPITAL WHICH WERE NOT AGREED UPON BY THE PARTIES TO THE AGREEMENT. THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY VACATED THE AWARD BECAUSE IT IMPOSED THE ARBITRATOR'S "OWN BRAND OF INDUSTRIAL JUSTICE" RATHER THAN INTERPRETING THE PARTIES' AGREEMENT 5

REASONS FOR DENYING THE PETITION 8

A. THE ARBITRATION AWARD WAS PROPERLY VACATED IN ACCORDANCE WITH CLEAR LEGAL PRECEDENT ESTABLISHED BY THIS COURT. RATHER THAN INTERPRETING THE TERMS OF THE GOVERNING COLLECTIVE BARGAINING AGREEMENT, THE ARBITRATOR IGNORED ITS PLAIN LANGUAGE AND INSTEAD IMPOSED HIS OWN BRAND OF INDUSTRIAL JUSTICE, THEREBY FAILING TO DRAW THE ESSENCE OF THE AWARD FROM THE AGREEMENT 8

TABLE OF CONTENTS – Continued

Page

B. REMAND TO THE ARBITRATOR FOR FURTHER PROCEEDINGS IS UNNECESSARY BECAUSE THE COURT BELOW DID NOT REPLACE THE ARBITRATOR'S FACTUAL DETERMINATIONS WITH ITS OWN OR DIRECT JUDGMENT FOR THE HOSPITAL, BUT RATHER SIMPLY VACATED THE ARBITRATOR'S AWARD 16

C. NO PURPOSE WOULD BE SERVED BY THE COURT GRANTING THE PETITION ON THE INHERENT MANAGEMENT RIGHTS QUESTION PRESENTED BY THE UNION BECAUSE THE COLLECTIVE BARGAINING AGREEMENT ITSELF EXPRESSLY RESERVED ALL MANAGEMENT RIGHTS TO THE HOSPITAL EXCEPT AS OTHERWISE LIMITED BY A SPECIFIC TERM OF THE CONTRACT 18

D. THIS ACTION WAS BROUGHT AND HAS BEEN RESOLVED EXCLUSIVELY UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT GOVERNING LABOR ARBITRATIONS. THE UNION'S ATTEMPT TO INJECT THE NEW, UNRELATED ISSUE OF THE STANDARD FOR VACATUR UNDER THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 10(a), GOVERNING COMMERCIAL ARBITRATIONS, SHOULD BE REJECTED 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215 (5th Cir. 1990) 25

Appalachian Regional Healthcare, Inc. v. United Steelworkers of America, 245 F.3d 601 (6th Cir. 2001) 22

Cardinale v. Louisiana, 394 U.S. 437 (1969) 23

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 23

Dobbs, Inc. v. Local 614, Internat'l Bhd of Teamsters, 813 F.2d 85 (6th Cir. 1987)..... 9

Dreis & Krump Mfg. Co. v. Internat'l Ass'n of Machinists & Aerospace Workers, 802 F.2d 247 (7th Cir. 1986).....20, 21

Folger Coffee Co. v. United Auto Workers, Local 1805, 905 F.2d 108 (5th Cir. 1990).....20, 21

Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, 531 U.S. 57 (2000) 9

Edward Hines Lumber Co. v. Lumber & Sawmill Workers, 764 F.2d 631 (9th Cir. 1985) 20, 21

Inter-City Gas Corp. v. Boise Cascade Corp., 845 F.2d 184 (8th Cir. 1988).....24, 25

Jenkins v. Prudential-Bache Securities, Inc., 847 F.2d 631 (10th Cir. 1988)..... 25

Major League Baseball Players Association v. Garvey, 532 U.S. ___, 149 L.Ed.2d 740, 121 S.Ct. 1724 (2001) 16, 17, 18

Michigan Mutual Ins. Co. v. Unigard Security Ins. Co., 44 F.3d 826 (9th Cir. 1995) 25

TABLE OF AUTHORITIES – Continued

Page

Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) 10

Moses H. Cone Memorial Hospital v. Mercury Construction, 460 U.S. 1 (1983) 10

National Gypsum Co. v. Chemical Workers, 147 F.3d 399 (5th Cir. 1998) 19, 20

NCR Corp., E&M-Wichita v. Internat'l Ass'n of Machinists & Aerospace Workers, 906 F.2d 1499 (10th Cir. 1980) 20, 21

Sisson v. Ruby, 497 U.S. 358 (1990) 23

Southland Corp. v. Keating, 465 U.S. 1 (1984) 10

Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957) 23

United Paperworkers Internat'l Union v. Misco, Inc., 484 U.S. 29 (1987) 8, 9, 17, 24

United States Steel Corp. v. Nichols, 229 F.2d 396 (6th Cir. 1956) 11

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 7, 8, 9, 24

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 10, 11, 12

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15 (2nd Cir. 1997) 25

STATUTES

9 U.S.C. § 10(a) 22, 24, 25, 26

29 U.S.C. § 158(d) 20

29 U.S.C. § 185(a) 1, 6, 8, 22

STATEMENT OF THE CASE

This matter was a routine case involving a labor arbitration award (the "Award") that was vacated because it patently failed to "draw its essence" from the governing collective bargaining agreement. Applying long-established, consistently-followed law as set forth by this Court, the district court and the court of appeals below properly vacated the Award pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("Section 301"), because the arbitrator ignored the plain language of the collective bargaining agreement between the parties (the "Agreement") and instead imported the arbitrator's own notions of industrial justice, thereby failing to draw the essence of the Award from the Agreement. The Union's attempt in its Petition for a Writ of Certiorari to inject new and irrelevant issues into what has been a relatively simple and straightforward proceeding should be rejected.

A. THE GRIEVANTS WERE DISCHARGED AFTER THEY REPEATEDLY REFUSED DIRECT ORDERS TO CONTINUE WORKING PAST THE END OF THEIR REGULAR SHIFT.

The relevant facts were uncomplicated and undisputed. Respondent Appalachian Regional Healthcare, Inc. ("ARH" or "the Hospital"), a not-for-profit charitable corporation under the laws of the Commonwealth of Kentucky, operates several hospitals and health care facilities in eastern Kentucky and West Virginia, including a hospital located in South Williamson, Kentucky, where

the relevant events transpired. (Pet. App. at 1a) Petitioners, the United Steelworkers of America, AFL-CIO-CLC, and its Local 14398 (collectively, the "Union"), represent certain ARH employees at the South Williamson hospital pursuant to a collective bargaining agreement (the "Agreement") governing the terms and conditions of employment for employees in the bargaining unit. (*Id.* at 1a-2a, 26a-30a)

On December 30, 1997, three bargaining unit employees, Chris Adkins, Steven Mahon and Lamar Thomas (the "Grievants"), who had been scheduled to work their usual part-time shift from 4:30 p.m. to 8:30 p.m., refused a supervisor's direct order to "stay on their machines" beyond 8:30 p.m. (Pet. App. at 2a) Without offering a reason as to why they would not remain, the Grievants refused and walked off the job. (*Id.*) The Grievants received a "Written Record of Verbal Warning" the next day for insubordination and violation of ARH's Code of Ethics. The Grievants did not challenge this discipline. (*Id.*)

Less than a week later, on January 2, 1998, a Hospital supervisor again instructed the Grievants to continue working past 8:30 p.m. based on the supervisor's determination that "additional work was required." (Pet. App. at 2a, 21a) The Grievants again refused their supervisor's instruction and walked off the job without offering any excuse or reason as to why they did not wish to work past the end of their regularly-scheduled shift. (*Id.*) The Hospital subsequently suspended and, on January 8, 1998, terminated the Grievants for insubordination and violation of ARH's "Code of Ethics" for abandoning their

jobs in disregard of a direct order from their supervisor. (*Id.*)

Each of the three Grievants subsequently filed a grievance over his discharge and, pursuant to the grievance and arbitration procedures of the Agreement, the matters jointly proceeded to arbitration on October 13, 1998. (Pet. App. at 2a-3a)

B. THE RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT.

Article XLII of the Agreement, entitled "Management Rights," states that "Management of the Hospital includes the rights, among others, of hiring, discharging, and **directing the working force**, and of establishing reasonable policies in connection therewith, and **all management rights are vested exclusively in the Hospital** and shall not be abridged by the Union. However, . . . any [management] policy shall not abridge any term, provision or condition of this contract." (Pet. App. at 29a) (emphasis added). Thus, by the plain language of the Agreement, ARH reserved all management rights except as specifically limited by a particular term of the Agreement.

Article XV of the Agreement, "Hours of Work and Work Week," which sets forth bargaining unit employees' entitlement to overtime pay, establishes in Section A that the "basic work day" for all employees shall be eight hours per day and the "basic work week" shall be 40 hours per week, and continues in Section B that "[h]ours worked in excess of the basic work day (8 hours) or the basic work week (40 hours) shall be paid at the rate of

time and one-half the regular straight time rate." (Pet. App. at 26a-27a) Section E of Article XV reinforces the management rights provision cited above by emphasizing the parties' understanding that: "The provisions of this Article are intended only to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such Employee of any specific number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such Employee." (*Id.* at 27a) Section D of Article XV further plainly states that "Employees shall be expected to work overtime when requested . . . . " (*Id.*)

Article XXXIII of the Agreement provides a grievance and arbitration procedure to address disputes or complaints concerning the interpretation or application of the contract's provisions. (Pet. App. at 28a) Article XXXIII, Section K of the Agreement specifically states that an arbitrator selected by the parties to hear a grievance "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital . . . . " (*Id.*)

C. THE ARBITRATION AWARD IGNORED EXPLICIT CONTRACT PROVISIONS AND IMPOSED LIMITATIONS UPON THE HOSPITAL WHICH WERE NOT AGREED UPON BY THE PARTIES TO THE AGREEMENT. THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY VACATED THE AWARD BECAUSE IT IMPOSED THE ARBITRATOR'S "OWN BRAND OF INDUSTRIAL JUSTICE" RATHER THAN INTERPRETING THE PARTIES' AGREEMENT.

The arbitration hearing primarily revolved around the factual dispute of whether or not the Grievants had been given a direct order to continue working past the end of their shift. In the Award, issued on December 11, 1998, the arbitrator explicitly rejected the Union's contention that the Grievants had been confused about whether they were to stay on the job or could go home, finding that "[a] direct order to continue [to] work was issued on both occasions." (Pet. App. at 2a, n. 1, 22a) Neither this nor any other factual determination by the arbitrator has ever been challenged by either party. The arbitrator nonetheless ignored the express, unambiguous provisions of the Agreement set forth above, which recognize that ARH retained all management rights to "direct[ ] the work force" and "fix the number of hours of work," and sustained the grievances, ordering the Hospital to reinstate the three Grievants with back pay on the sole basis that "[t]here is no provision permitting the Employer to require an employee to work more than their [*sic*] regular scheduled part-time hours." (*Id.* at 24a)

On February 4, 1999, the Hospital filed a complaint to vacate the arbitrator's decision pursuant to Section 301 of

the Labor Management Relations Act, 29 U.S.C. § 185(a), in the United States District Court for the Eastern District of Kentucky. (Pet. App. at 4a) The Union counterclaimed for enforcement of the Award. Following briefing on cross motions for summary judgment, the district court granted the Hospital's motion on November 2, 1999, finding that the Award failed to draw its essence from the Agreement because:

> The collective bargaining agreement clearly establishes Appalachian's right to require employees to work overtime. This insures that patients are not put at risk when a particular shift is understaffed. The rights to management of employees' work schedules is unambiguously vested in Appalachian under this Agreement. The arbitrator's decision to reinstate the discharged employees, after Appalachian exercised its rights under the agreement, must be reversed.

(Pet. App. at 16a) Noting the basic principles, long-ago articulated by this Court, that arbitrators are without authority to disregard or modify plain and unambiguous contract provisions (both as a matter of law and under the specific language of Article XXXIII, Section K of the Agreement here), and that a collective bargaining agreement need not lay out specific guidelines that indicate what an employer is "permitted" to do to manage its business or direct its workforce, but rather an employer is free to manage except as specifically prohibited by a collective bargaining agreement (again, both as a general proposition and pursuant to the specific language of Article XLII of the Agreement), the district court ruled that ARH "should not be subject to an arbitrator's award

altering the collective bargaining agreement." (*Id.* at 17a; *see also,* Pet. App. at 28a-29a)

The United States Court of Appeals for the Sixth Circuit affirmed. Properly noting that "[r]eview of an arbitrator's award is necessarily limited" and that a "reviewing court will not replace an arbitrator's construction of the Agreement with its own interpretation," the Sixth Circuit found that the Award was properly vacated because rather than *interpreting* the terms of the Agreement, the arbitrator *ignored* them. (Pet. App. at 5a-7a) While heeding this Court's admonition that "courts must accord an arbitrator's decision substantial deference because it is the arbitrator's construction of the agreement, not the court's construction, to which the parties have agreed," the Sixth Circuit found that the Award failed to "draw[ ] its essence from the collective bargaining agreement" and rather "serve[d] the arbitrator's 'own brand of industrial justice' " because it "conflict[ed] with express terms of the collective bargaining agreement" and "impose[d] additional requirements that are not expressly provided in the agreement." (*Id., citing United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960). In summary:

> The arbitrator created a limitation on ARH's management rights that is not found in the Agreement. In doing so, the arbitrator's decision failed to draw its essence from the Agreement.

(*Id.* at 9a) The Sixth Circuit subsequently denied the Union's petition for a rehearing *en banc* on May 10, 2001. (*Id.* at 25a)

REASONS FOR DENYING THE PETITION

A. THE ARBITRATION AWARD WAS PROPERLY VACATED IN ACCORDANCE WITH CLEAR LEGAL PRECEDENT ESTABLISHED BY THIS COURT. RATHER THAN INTERPRETING THE TERMS OF THE GOVERNING COLLECTIVE BARGAINING AGREEMENT, THE ARBITRATOR IGNORED ITS PLAIN LANGUAGE AND INSTEAD IMPOSED HIS OWN BRAND OF INDUSTRIAL JUSTICE, THEREBY FAILING TO DRAW THE ESSENCE OF THE AWARD FROM THE AGREEMENT.

Vacatur of the arbitrator's Award in this matter was proper and correct under the well-established, undisputable legal principles articulated by this Court. A labor arbitration award must be vacated under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), when the award fails to "draw its essence" from the controlling collective bargaining agreement but instead dispenses the arbitrator's "own brand of industrial justice." *Enterprise Wheel, supra*, 363 U.S. at 596-97. An award fails to draw its essence from the labor agreement when the arbitrator "ignore[s] the plain language of the contract." *United Paperworkers Internat'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). There is no conflict among the circuit courts of appeals on this universally recognized standard. Because the lower courts merely applied these long established principles to the Award at issue, no important purpose would be served by this Court granting the Union's Petition here.

Judicial review of an arbitrator's award is of course limited. "As long as the arbitrator's award 'draws its

essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." *Misco, supra,* 484 U.S. at 36, *citing Enterprise Wheel, supra,* 363 U.S. at 597; *see also, Eastern Associated Coal Corp. v. United Mine Workers of America, District 17,* 531 U.S. 57, 62 (2000). Accordingly, the Sixth Circuit in its decision below correctly recognized that: "Review of an arbitrator's award is necessarily limited. A reviewing court will not replace an arbitrator's construction of the Agreement with its own interpretation." (Pet. App. at 5a)

Nevertheless, it is the arbitrator's interpretation *of the agreement* for which the parties have bargained, and thus, "[t]he arbitrator may not ignore the plain language of the contract." *Misco, supra,* 484 U.S. at 36, *citing Enterprise Wheel, supra,* 363 U.S. at 599. *See also, Dobbs, Inc. v. Local 614, Internat'l Bhd of Teamsters,* 813 F.2d 85, 86 (6th Cir. 1987) ("the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions.") (citations omitted). Moreover, the governing Agreement itself specifically provides that an arbitrator selected by the parties to hear a grievance "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital . . . . ". *See* Article XXXIII, Section K (Pet. App. at 28a).[1]

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[1] The Union has emphasized in its Petition that judicial inquiry under Section 301 must be strictly confined to the question of whether the parties "agree[d] to give the arbitrator

In the instant matter, the Award was properly vacated because, first, the arbitrator imported a new limitation which is nowhere contained in the Agreement for which the parties had bargained. The Agreement explicitly preserves to the Hospital *all* management rights except as limited by another term of the Agreement. *See* Article XLII, Section A (Pet. App. at 29a). Neither the arbitrator nor the Union ever pointed to any provision anywhere in the Agreement limiting the Hospital's otherwise exclusive management rights with respect to part-time employees.[2] In fact, there is no such limitation. Therefore, the Award was properly vacated because instead of following the plain language of the Agreement, it invented a new, conflicting provision.

The arbitrator's failure to follow the plain language of the Agreement is highlighted by his clearly fallacious reasoning that because "there is no provision *permitting*

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the power to make the award he made." (Petition at 13, 14, *quoting United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). The Hospital heartily agrees and, as discussed herein, it is patent that the arbitrator here exceeded his powers because he ignored the plain language of the Agreement. The series of cases that the Union went on to cite, however, such as *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1 (1983), *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), all dealt with the issue of arbitrability, *i.e.*, whether a particular grievance fell within the scope of an arbitration provision. Because arbitrability has never been an issue in the instant proceedings, such cases are wholly inapposite here.

[2] Nor did the arbitrator or the Union identify any past practice, custom, or external law creating any such limitation.

the employer to require an employee to work more than their regular[ly] scheduled part-time hours," the Hospital is therefore *prohibited* from doing so. (Pet. App. at 23a) This backwards conclusion failed to draw its essence from the Agreement for at least two independent reasons.

First, this conclusion was premised upon a fundamentally flawed notion – that an employer must be expressly "given" the power, through a provision of a collective bargaining agreement, to direct its employees when to work. It is a bedrock principle of labor law that an employer inherently begins with *all* rights of management and is free to operate its business and manage, direct and schedule its employees *except as otherwise limited* by the governing collective bargaining agreement, past practice or external law. *Warrior & Gulf, supra,* 363 U.S. at 583; *see also, United States Steel Corp. v. Nichols,* 229 F.2d 396, 399 (6th Cir. 1956). In *Warrior & Gulf,* this Court recognized that:

> Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. **Management hires and fires, pays and promotes, supervises and plans. All of these are part of its function, and absent a collective bargaining agreement, it may be exercised freely** except as limited by public law and by the willingness of employees to work under the particular unilaterally imposed conditions.

Id., 363 U.S. at 583 (emphasis added).[3]

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[3] In the proceedings before the lower courts, the Union disputed this long-established principle that employers begin

Second – and more importantly, for purposes of the instant proceeding – even assuming, *arguendo*, that an employer does not have any inherent ownership right to manage its business and direct its employees, as the Union illogically continues to argue, there is in this case an explicit provision of the Agreement – Article XLII, Section A – which unequivocally confirms that "all management rights are vested exclusively in the Hospital," specifically stating that such rights include "directing the working force." (Pet. App. at 29a)

Faced with this explicit contractual reservation of all management rights to the Hospital, the Union below sought to justify the arbitrator's award as "contract interpretation" by relying upon the qualifying limitation in the same provision which states that "any [management] policy shall not abridge any term, provisions or condition of this contract." (*Id.*) The fatal flaw in this argument is that the Agreement contains no limiting "term, provision

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with all rights to direct and manage their business – basically just the inherent rights of ownership – and the corollary that, upon recognition of a labor union, all such rights remain with the employer except as specifically limited or delegated in the collective bargaining agreement. Not surprisingly, the Union cited no authority in support of its argument. The Union did quote, out of context, language from *Warrior & Gulf* that simply recognized that the "past practice" of the workplace may also, in addition to the specific provisions of the contract, create limitations on an employer's pre-existing management rights, and therefore the grievance at issue in *Warrior & Gulf*, involving contracting out, was considered *arbitrable*. *Id.*, 363 U.S. at 581-83. That principle, with which the Hospital has no quarrel, is irrelevant here because the Award did not purport to rest its conclusion that the Hospital lacked the right to set its employees' hours upon any past practice.)

or condition" stating that the Hospital may *not* direct part-time employees to continue working beyond the conclusion of their regularly-scheduled shift. In the absence of such a provision, the arbitrator acted beyond his authority in unilaterally creating one in derogation of plain contract language prohibiting him from doing so. Tellingly, the Award did not purport to cite any existing provision of the Agreement (nor any "past practice") as the source of the supposed limit on the Hospital's right to set the hours its employees work and otherwise direct its workforce. To the contrary, the arbitrator imported his assumption that such a limitation existed unless the Agreement affirmatively stated otherwise. The Award therefore created an extra-contractual limitation in violation of the plain language of the Agreement, which is exactly what an arbitrator may not do both under governing Section 301 law and under Article XXXIII, Section K of this particular Agreement.

The Award also disregarded and directly contradicted several other express terms included by the parties in the Agreement. Specifically, Article XV, Section D of the Agreement plainly recognizes that "Employees shall be expected to work overtime when requested," and Section E of that same Article provides that:

> **The provisions of this Article are intended *only* to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as** a guarantee to such Employee of any specified number of hours of work either per day or per pay period or as **limiting the right of the Hospital to fix the number of hours of work, including**

> **overtime, either per day or per pay period**, for such Employee.

(Pet. App. at 27a) (emphasis added). The arbitrator provided no "interpretation" of these unambiguous provisions, but rather simply ignored their clear commands. Thus, it was the exact words of Article XV – not the lower courts' substitution of their own "contract interpretation" for that of the arbitrator, as the Union mistakenly contends – which squarely prohibited the arbitrator's implicit finding (and the Union's explicit argument below) that the "purpose" of Article XV was to "authorize" the Hospital to require "overtime" work, but only for full-time employees. Although Article XV twice explicitly acknowledges the Hospital's existing right to require overtime, that right plainly originates not from Article XV itself (as Section E makes clear) but rather from (a) all employers' inherent management rights and/or (b) Article XLII's specific reservation of same.[4]

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[4] To the extent that the Award was, as the Union argued below, purportedly based on Article XV's overtime (pay) provisions, it also failed to draw its essence from the Agreement because it directly conflicted with terms that are expressly contained therein. In addition to the Hospital's inherent and contractual exclusive right to direct the workforce discussed above, Article XV, Section E of the Agreement explicitly references "**the right of the Hospital to fix the number of hours of work . . . either per day or per pay period** . . . . " (Pet. App. at 27a) The provision does not state that such right is limited in any way. Had the Hospital ever agreed to exclude part-time employees from the reach of its expansive right to direct and schedule its employees, it seems safe to assume that the Union certainly would have insisted on including that limitation in this provision.

The Union argues in its Petition that the court of appeals' decision below is "pernicious" because it "remov[es] from the arbitrator's consideration whether a labor agreement contains implied, as well as express[,] obligations." (Petition at 15) This is simply wrong. The point is, the arbitrator here never identified *any* restrictions, express or implied, on the Hospital's management rights to direct and schedule its workforce (be those rights inherent or as reserved by the express provisions of the Agreement). Furthermore, even supposing, *arguendo*, that the arbitrator had relied on some sort of unidentified "implied" obligation, the Award still was properly vacated because this hypothetical "implied" provision would squarely conflict with the express, unambiguous terms actually set forth in the Agreement as discussed above. The arbitrator's decision to ignore these unambiguous provisions of the Agreement exceeded the express limits placed on his authority in Article XXXIII, Section K of the Agreement, which states that an arbitrator selected by the parties to hear a grievance "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital . . . . " (Pet. App. at 28a) The Award therefore was correctly vacated in accordance with the undisputed governing legal principles.

B. REMAND TO THE ARBITRATOR FOR FURTHER PROCEEDINGS IS UNNECESSARY BECAUSE THE COURT BELOW DID NOT REPLACE THE ARBITRATOR'S FACTUAL DETERMINATIONS WITH ITS OWN OR DIRECT JUDGMENT FOR THE HOSPITAL, BUT RATHER SIMPLY VACATED THE ARBITRATOR'S AWARD.

In addition to the legal correctness of the lower courts' decisions based on well-established and non-controversial legal principles, the Petition for a Writ of Certiorari should also be denied because none of the three questions the Union purports to present has any bearing on the issues that actually have been involved in this matter. The questions the Union has presented in its Petition are red herrings having little or nothing to do with the mundane issues actually decided below. None of the questions the Union presents is pertinent to, let alone determinative of, the challenged decisions.

First, the Union urges the Court to reverse and remand the lower court's decision based on the Court's recent *per curiam* decision in *Major League Baseball Players Association v. Garvey*, 532 U.S. ___, 149 L.Ed.2d 740, 121 S.Ct. 1724 (2001). ARH respectfully submits that *Garvey* does not require such action, which would be a pointless waste of judicial resources. In *Garvey*, unlike here, the court of appeals rejected a labor arbitrator's factual findings, particularly those with respect to credibility, and improperly substituted its own resolution of those disputed factual issues for the arbitrator's:

> The substance of the Court's discussion reveals that it overturned the arbitrator's decision

> because it disagreed with the arbitrator's factual findings, particularly those with respect to credibility. The Court of Appeals, it appears, would have credited Smith's 1996 letter, and found the arbitrator's refusal to do so at worst "irrational" and at best "bizarre." But even "serious error" on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority.

Id., 121 S.Ct. at 1728, *quoting Misco, supra*, 484 U.S. at 38. Again referencing *Misco*, the Court emphasized that "the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." *Id.* The Court therefore found the Ninth Circuit's substitution of its own factual conclusions, and direction of judgment in favor of Garvey rather than remanding to the arbitrator for further factfinding, improper under controlling Supreme Court precedent. *Id.* at 1729, *quoting Misco, supra*, 484 U.S. at 40-41, n. 10.

In the instant matter, by contrast, the arbitrator neither construed the Agreement nor acted within the scope of his limited authority under the Agreement's plain language. Nor did the lower courts merely substitute their judgment for that of the arbitrator. Moreover, the court of appeals neither displaced the arbitrator's factual findings nor directed judgment in favor of ARH; rather, it merely vacated the Award, precisely as the *Garvey* Court directed. *Id.* at 1728 ("the court should 'simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement.' ") (*citing Misco, supra*, 484 U.S. at 40-41, n. 10). The Union here never sought "further proceedings,"

nor has it identified any contractual basis for permitting such proceedings. In fact, there was and is no use for such proceedings because, unlike in *Garvey*, the court of appeals did not dispute the arbitrator's findings of fact but rather vacated the Award for ignoring the plain language of the Agreement and exceeding the arbitrator's expressly limited powers thereunder. ARH thus respectfully submits that *Garvey* does not require reversal or remand here.

C. NO PURPOSE WOULD BE SERVED BY THE COURT GRANTING THE PETITION ON THE INHERENT MANAGEMENT RIGHTS QUESTION PRESENTED BY THE UNION BECAUSE THE COLLECTIVE BARGAINING AGREEMENT ITSELF EXPRESSLY RESERVED ALL MANAGEMENT RIGHTS TO THE HOSPITAL EXCEPT AS OTHERWISE LIMITED BY A SPECIFIC TERM OF THE CONTRACT.

The Union next argues that "the circuit courts are now split on the issue of whether the principle of reserved management rights is, as a matter of law, part of every collective bargaining agreement." (Petition at 8) The five cases cited by the Union (Petition at 9-12) provide no support for this assertion. In the first place, none of the decisions cited truly involved the issue of "inherent" management rights. Rather, as here, the cited decisions all involved an arbitrator's interpretation of an express management rights clause contained in a collective bargaining agreement. Unlike in the case at bar, however, in each of the cases cited, the arbitrator found

either (a) an explicit written provision of the labor contract or (b) a past practice of sufficient consistency and longevity, that limited the employer's management rights as set forth in the particular contractual clause.[5] Here, on the other hand, the arbitrator never identified any contract provision (or past practice or external legal requirement) that limited the Hospital's express contractual right to direct the work force and schedule its employees as it determined necessary on a day to day basis.

In *National Gypsum Co. v. Chemical Workers*, 147 F.3d 399 (5th Cir. 1998), for example, which involved the issue of whether the employer had a contractual duty to bargain with the union over a scheduling change (from seven day work weeks to a maximum of six days, which reduced the amounts of overtime earned by bargaining unit members), neither the arbitrator nor the court even addressed – let alone denied the existence of – the "inherent" management rights of the company. The arbitrator merely stated, uncontroversially, that management rights are not boundless, but may be "expressly limited by the written terms of [the] Agreement." *Id.* at 405.[6] The

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[5] Incidentally, the courts of appeals in all of the cases cited by the Union applied the same standard of review as did the Sixth Circuit here. *See, e.g., National Gypsum Co. v. Chemical Workers*, 147 F.3d 399, 403 (5th Cir. 1998) ("arbitral action contrary to express contractual provisions will not be respected;" "If the arbitrator ignores or refuses to apply a contractual provision that permitted the Company's action, 'the arbitrator exceed[s] the express limitations of his contractual mandate.' ").

[6] ARH has no quarrel with this proposition, nor with the related concept that a past practice, if sufficiently consistent, agreed upon and long-standing, may be considered part of the

arbitrator in *National Gypsum* then found, however, unlike here, that there were certain specific sections of the contract, as well certain provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d), that imposed upon the employer a duty to bargain with the union over rules changes substantially affecting the terms and conditions of work. *Id.* at 403-04. The court affirmed the arbitrator's decision because – again, unlike here – the arbitrator based his decision on the written terms of the agreement: "[t]he arbitrator went to considerable lengths to explain how his conclusion was grounded in the text of the agreement." *Id.* at 404.

All of the other decisions the Union cited involved the contracting out of bargaining unit work, a discrete area which directly involves the dictates of the NLRA. *See Folger Coffee Co. v. United Auto Workers, Local 1805*, 905 F.2d 108, 111 (5th Cir. 1990); *Dreis & Krump Mfg. Co. v. Internat'l Ass'n of Machinists & Aerospace Workers*, 802 F.2d 247, 253-54 (7th Cir. 1986); *NCR Corp., E&M-Wichita v. Internat'l Ass'n of Machinists & Aerospace Workers*, 906 F.2d 1499, 1501-02 (10th Cir. 1980); *Edward Hines Lumber Co. v. Lumber & Sawmill Workers*, 764 F.2d 631, 633 (9th Cir. 1985). Like *National Gypsum, supra*, moreover, none of these cases involved inherent management rights but dealt instead with the extent to which either other contract provisions, the NLRA, or established past practice limited the company's management rights as reserved by

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collective bargaining agreement. As noted above, however, neither of these principles come into play here because the arbitrator identified no such contract term or past practice supporting his decision.

a contract provision. *See Folger Coffee, supra,* 905 F.2d at 111 (because, pursuant to the NLRA, subcontracting cannot undermine the continued existence or strength of a recognized bargaining unit, "Article I [the union recognition clause of the agreement] therefore constitutes a limitation upon the Company's right to contract out."); *Dreis & Krump, supra,* 802 F.2d at 253-54 (similar; also reviewing past practice regarding contracting out); *NCR Corp., supra,* 906 F.2d at 1501-02, 1504 n. 11, 1506 (arbitrator construed recognition clause of contract versus ambiguous management functions clause to find, in light of past practice and NLRA requirements, that recognition clause prohibited the grieved subcontracting); *Edward Hines Lumber, supra,* 764 F.2d at 633 (recognition clause of contract, as well as past practice that was so well established and long-standing as to become part of the contract, barred contracting out all bargaining unit work).

In any event, regardless of the accuracy *vel non* of the Union's assertion of a "circuit split" concerning inherent management rights, the decisions below in the instant matter did not depend on this proposition alone because the Agreement also contained, in Article XLII, Section A, an *express* contractual reservation of all management rights to ARH except as otherwise specifically limited by a term of the Agreement. (Pet. App. at 29a) The Union attributes to the court of appeals below the view that, once the arbitrator found that there was no contract provision "permitting" the Hospital to require an employee to work past his regular shift (a conclusion which, as discussed above, simply ignored the Agreement's plain language), the arbitrator was constrained to hold that the right to schedule such work was inherently reserved to

the Hospital. (Petition at 9) This reasoning is only half correct, however, because the court of appeals correctly observed that such management rights were not only inherently, but also expressly – per Article XLII – reserved to the Hospital. *See Appalachian Regional Healthcare, Inc. v. United Steelworkers of America*, 245 F.3d 601, 605-06 (6th Cir. 2001) (Pet. App. at 6a-9a). Accordingly, even if the inherent management rights principle were to be taken out of the picture entirely, it would not result in reversal of the lower courts' decisions here. Thus, it would not be a productive use of the Court's time and resources to address this nondispositive issue.

D. THIS ACTION WAS BROUGHT AND HAS BEEN RESOLVED EXCLUSIVELY UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT GOVERNING LABOR ARBITRATIONS. THE UNION'S ATTEMPT TO INJECT THE NEW, UNRELATED ISSUE OF THE STANDARD FOR VACATUR UNDER THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 10(a), GOVERNING COMMERCIAL ARBITRATIONS, SHOULD BE REJECTED.

Finally, the Union hyperbolically claims that this case involves important issues of federal arbitration law and dramatically asserts that "[t]he time has come for this Court to harmonize the 'draws its essence' test for labor arbitration awards under Section 301 [of the Labor Management Relations Act, 29 U.S.C. § 185(a)] with the [Federal] Arbitration Act's grounds for vacating arbitration awards contained in [9 U.S.C.] Section 10(a)." (Petition at

15) This expansive invitation should be declined for a number of reasons.

First, this issue was never raised, let alone addressed, at any stage of the proceedings below. It should be rejected on that ground alone. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendant's costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us."); *Sisson v. Ruby*, 497 U.S. 358, 359 n. 1 (1990) (declining to consider argument under different statute that was not raised below); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing writ of certiorari after discovering in oral argument that issue had not been raised below). The instant case was brought, and has been analyzed and decided, exclusively under Section 301, in accordance with this Court's seminal decision in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957). There has never been any application or consideration of the Federal Arbitration Act ("FAA") in this case, which applies to commercial, not labor, arbitration. There is no justification, other than the Union's desperation to manufacture an issue on appeal, to inject this tangential, wholly unnecessary issue into the case at this late date.

Furthermore, even a cursory review of decisions by the courts of appeals indicates that the standard applied in actions to vacate arbitration awards under the two statutes is already in substantive harmony. As discussed above, the standard under Section 301 is that an arbitrator's award is not to be disturbed unless he has exceeded

his powers by failing to draw its essence from the collective bargaining agreement, ignoring the agreement's plain language and instead importing his own notions of industrial justice. *Misco, supra,* 484 U.S. at 38; *Enterprise Wheel, supra,* 363 U.S. at 597. Similarly, Section 10(a) of the FAA states in relevant part that: "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . (4) where the arbitrators exceeded their powers . . . . " 9 U.S.C. § 10(a)(4). The arbitrator in this case exceeded his authority under either standard by, as discussed above, violating Article XXXIII, Section K of the Agreement, which states that the arbitrator "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital . . . . " (Pet. App. at 28a)

The courts of appeals for many years have consistently interpreted this "exceeded powers" ground for vacatur under § 10(a) of the FAA as consonant with the *Enterprise Wheel* "draws its essence" standard under Section 301, and indeed have drawn upon labor arbitration case law for support. In *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988), for example, the court observed that:

> The arbitrator's authority, however, is not unlimited. Although the arbitrator may interpret ambiguous contract language, the arbitrator may not disregard or modify unambiguous contract provisions. As the Supreme Court has stated in the labor context, "The arbitrator may

> not ignore the plain language of the contract." More specifically, if the arbitrator "interprets unambiguous language in any way different from its plain meaning, [the arbitrator] amends or alters the agreement and acts without authority."

Id. at 187 (citations omitted); *see also, Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2nd Cir. 1997) (courts are not to "second guess an arbitrator's resolution of a contract dispute . . . . However, awards may be vacated . . . in the limited circumstances where the arbitrator's award is in manifest disregard of the terms of the agreement"); *Michigan Mutual Ins. Co. v. Unigard Security Ins. Co.*, 44 F.3d 826, 830-31 (9th Cir. 1995) ("An arbitration award may be overturned if it does not 'draw its essence' from the contract . . . . To consider whether an award drew its essence from the . . . agreement, the court must ensure that the arbitrator looked to the words of the contract . . . . "); *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990) ("as long as the arbitrator's decision 'draws its essence' from the contract, the award must be confirmed. To draw its essence from the contract, 'an [arbitrator's] award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the . . . agreement. The award must, in some logical way, be derived from the wording or purposes of the contract."); *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634-35 (10th Cir. 1988) (applying labor arbitration "draws its essence" standard to its review of commercial arbitration award under § 10(a) of FAA, court held that "the sole question for our

consideration is whether the arbitration panel ignored the plain language of the contract").

Therefore, even if § 10(a) of the FAA were relevant or had been at issue in this proceeding, there would be no need for this Court to "harmonize" it with Section 301; the courts of appeals already have been doing so consistently for well over a decade.

CONCLUSION

For each and all of the reasons set forth above, Respondent Appalachian Regional Healthcare, Inc. respectfully requests that the Union's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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